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In The

Supreme Court of the United States

October Term, 1984

FRANK J. MARCONE,

Petitioner,

vs.

PENTHOUSE INTERNATIONAL, LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. In a libel action in which the defendant asserts the *New York Times v. Sullivan* privilege does the defendant bear the burden of proving its allegation that the plaintiff is a public figure?

2. In a libel action in which the defendant asserts the *New York Times v. Sullivan* privilege may the public figure status of the plaintiff be established by mere hearsay newspaper reports?

3. In a libel action in which the defendant asserts the *New York Times v. Sullivan* privilege must disputed facts relevant to plaintiff's status as a public figure be decided by the jury even if the ultimate decision as to that status is for the Court?

4. Is a libel plaintiff's mere indictment for a crime for which he is not convicted sufficient to make him a limited purpose public figure?

5. Can an attorney's representation of a client render the attorney a limited purpose public figure?

6. Where the issue is whether there is sufficient evidence to warrant submission to the jury of the issue of actual malice under *New York Times v. Sullivan*, and there are conflicting inferences that can be drawn from the evidence, must the evidence be viewed in the light most favorable to the plaintiff?

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No.

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FRANK J. MARCONE,

Petitioner,

vs.

PENTHOUSE INTERNATIONAL, LTD.,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Frank J. Marcone, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 6, 1985 (timely motion for rehearing en banc denied on March 1, 1985).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 754 F.2d 1072. The opinion of the District Court for the Eastern District of Pennsylvania on post trial motions is reported at 577 F. Supp.

318, and the opinion of the district court on respondent's motion for summary judgment is reported at 533 F. Supp. 353. All these lower court opinions appear in the Appendix hereto, which is separately bound. (Citations to the opinions in the Appendix are made thus: App. 1, *etc.*)

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on February 6, 1985, and a timely petition for rehearing en banc was denied on March 1, 1985. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I.

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

STATEMENT OF THE CASE

This is a diversity jurisdiction libel action under Pennsylvania law in which the plaintiff-petitioner sought damages from the respondent, the publisher of Penthouse magazine, because of a November 1978 article entitled "The Stoning of America," in which petitioner was listed as an example of an "attorney criminal" who "contributed down payments of up to $25,000 on grass [marijuana] transactions" and against whom charges "were dismissed because he cooperated with further investigations." In its answer to the complaint the respondent alleged that petitioner was a public figure and that, therefore, it was entitled to the constitutional privilege set forth in *New York Times v. Sullivan*. On a summary judgment motion, however, the District Court

for the Eastern District of Pennsylvania determined that petitioner was a private and not a public figure and, therefore, Penthouse was not entitled to the constitutional privilege. The trial resulted in a jury verdict for petitioner in the amount of $30,000 in compensatory damages and $537,500 in punitive damages. Penthouse's post trial motions were denied by the District Court except that a remittitur of punitive damages to $200,000 was ordered by the Court and accepted by petitioner.

On appeal the Court of Appeals for the Third Circuit, after finding the article to be defamatory under Pennsylvania law, held as a matter of law that although this is a "close case," the petitioner was a limited purpose public figure (754 F.2d at 1086-87, App. 27) and that there was insufficient evidence in the record of actual malice.[1] Based on these determinations the Court of Appeals entered judgment in favor of Penthouse notwithstanding the verdict.

The sole evidence in the record on which the Court of Appeals could have based its finding that petitioner was a limited purpose figure was as follows: Petitioner, an attorney from the Philadelphia area, was indicted in Detroit for allegedly participating in drug trafficking. The indictment was "widely reported by the Philadelphia area media." Petitioner had represented various members of two motorcycle gangs, the Pagans and the Warlocks, but did not engage in any activity to bring attention "to his clients or himself." There were newspaper reports that petitioner had met at some unspecified time with one of his clients and others at the Castle, a place which was allegedly the headquarters of the motorcycle gangs and which was allegedly linked to the drug ring which was the subject of the Detroit indictment. There was

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1. Although the case was tried on the basis of plaintiff's being a private figure, the issue of actual malice was presented to the jury as related to punitive damages, resulting in a verdict for petitioner.

also a newspaper report that petitioner, at an unspecified time and place, had taken occasional weekend trips with motorcycle gang members.

On the other hand, the evidence in the record which would support a finding of actual malice is as follows: The draft of the article as submitted by the author, a free-lance writer, stated that charges against Marcone were dismissed in favor of another indictment. This statement was confirmed by a Senate Subcommittee report which Penthouse had obtained to verify the statements against Marcone. This statement, however, did not support one of the themes of the article that attorney criminals were not being severely punished for their participation in drug trafficking. Penthouse altered the article and instead of the statement made by the author, Penthouse published the statement that, "charges against him [Marcone] were dismissed because he cooperated with further investigations." The only possible support for this change in the article was a footnote in the Senate Subcommittee report which indicated that the sentence of some defendants was reduced because of cooperation. The footnote indication, however, did not appear next to Marcone's name.[2] Moreover, the footnote mentioned a reduction in the sentence of certain defendants and Penthouse had no information that Marcone had ever been sentenced for any crime and in fact, he had not been convicted or sentenced. Nevertheless, the Court of Appeals stated that it was "clear" that the footnote was misread or misinterpreted by Penthouse and was the reason why Penthouse altered the author's draft (754 F.2d at 1090, App. at 35).

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2. Contrary to the Court of Appeals' opinion (754 F.2d at 1076, App. at 4) the record does disclose why Marcone was not reindicted. It was because there was insufficient evidence. 577 F. Supp. at 329, App. at 106-7).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS INVOLVES IMPORTANT QUESTIONS WHICH HAVE NOT BEEN, BUT SHOULD, BE SETTLED BY THIS COURT CONCERNING THE ALLOCATION OF THE BURDEN OF PROVING THE PUBLIC FIGURE STATUS OF A LIBEL SUIT PETITIONER, THE QUALITY OF PROOF ADMISSIBLE TO PROVE THAT STATUS, AND THE RIGHT TO A JURY TRIAL OF DISPUTED ISSUES OF FACT RELATED TO THAT STATUS.

Based on the district court's summary judgment determination, the present case was tried on the theory that the petitioner was a private and not a public figure.[3] On appeal, however, the Court of Appeals, relying on hearsay evidence which had been admitted solely for an unrelated reason, determined as a matter of law that petitioner was a limited purpose public figure, and because the Court of Appeals also found insufficient evidence of actual malice, it entered judgment in favor of the respondent notwithstanding the verdict. Thus, there was no trial of the issue of whether the petitioner was a private or public figure. To the extent that there was insufficient evidence, the Court of Appeals

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3. On the defendant's motion for summary judgment the district court determined "that Mr. Marcone is not a public figure for the limited purposes of this action" (533 F. Supp. at 360, App. at 65-66). Although the plaintiff had filed no cross motion this determination of plaintiff's status was treated as final by the district court and both parties at trial, and no evidence was offered at trial directed to plaintiff's status. On post trial motions the issue of the plaintiff's status as a private figure was, likewise, treated as having been determined by the summary judgment motion (517 F. Supp. at 322, App. at 75). The Third Circuit also treated the issue as foreclosed prior to trial. (754 F.2d at 1077, App. at 6).

determined the issue in favor of the respondent, and to the extent that there was conflicting evidence of the facts on which the determination of petitioner's status was based, the Court of Appeals decided that conflict as a matter of law in favor of the respondent.

In none of the public figure defamation cases previously decided by this Court has there been a dispute as to the facts on which the alleged public figure status of the plaintiff was based.[4] Therefore, this Court has not as yet had the occasion to settle the important procedural questions involved here as to whether hearsay evidence is admissible to prove the public figure status of the plaintiff, which party has the burden of proof as to that status and whether there is a right to jury trial as to the disputed facts on which the determination of that status is made. These procedural questions are of broad importance since they could arise in any defamation case where it is contended that the plaintiff is a public figure, and, therefore, should be settled by this Court.

A. This Court Has Not, But Should Settle the Important Question of Whether the Defendant Has the Burden of Proving the Plaintiff to Be a Public Figure.

Although the Court of Appeals in the instant case did not explicitly place the burden on the petitioner of disproving his public figure status, a review of the Court of Appeals' analysis

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4. *Bose v. Consumers Union of U.S.*,____ U.S. ____, 104 S. Ct. 1949, 1955, ____ L. Ed. 2d ____ (1984) (petitioner did not contest public figure status); *Wolston v. Reader's Digest Assoc., Inc.*, 443 U.S. 157, 166, 99 S. Ct. 2701, 2706, 61 L. Ed. 2d 950 (1979) (undisputed facts do not justify public figure status); *Hutchinson v. Proxmire*, 443 U.S. 111, 139-36, 99 S. Ct. 2675, 2688, 61 L. Ed. 2d 411 (1979) (same); *Time, Inc. v. Firestone*, 424 U.S. 498, 453-55, 96 S. Ct. 958, 965, 47 L. Ed. 2d 154 (1976) (same); *Gertz v. Robert Welch, Inc.*, 415 U.S. 323, 325-26, 351-52, 94 S. Ct. 2997, 3000-01, 3013, 41 L. Ed. 2d 789 (1974) (same).

demonstrates that it, in fact, placed the burden on petitioner and that if the court had recognized that the burden lay on the respondent, it would have concluded that respondent had not met its burden of proof.[5] The Court of Appeals found "Marcone's non-representational contacts with the Pagans" to be crucial to its determination that Marcone was a limited purpose public figure[6] (754 F.2d at 1086, App. at 25). These so-called non-representational contacts included meetings at the Castle with Frey, Heron and Mealy and occasional weekend trips with motorcycle gang members (*ibid.*). Assuming for purposes of discussion that these contacts did in fact occur, there is insufficient evidence in the record to permit them to be used to establish the petitioner as a public figure. With regard to the meetings at the Castle with Frey, Heron and Mealy, there is no evidence whatsoever as to when the meetings occurred or whether they were of a completely private nature. Moreover, as noted by the Court of Appeals, Marcone represented Frey (754 F.2d at 1085, App. at 23), and there is no evidence that the meetings were not solely in furtherance of that representation. With regard to the weekend trips, there is absolutely no evidence when or where these trips occurred, *i.e.*, whether they occurred years before or whether they were in completely private circumstances.[7]

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5. Since respondent did not meet even the minimal burden of producing *prima facie* evidence that petitioner was a public figure, it is not necessary, for present purposes, to distinguish between the burden of producing evidence and the burden of persuasion.

6. The Court of Appeals in the present case cites no authority for its holding that a lawyer's non-representational contacts with his clients can convert him into a public figure.

7. This Court in *Wolston v. Reader's Digest Ass'n., Inc.*, 993 U.S. 157, 163, 165, 99 S. Ct. 2101, 2705, 2706, 61 L. Ed. 2d 450 (1979), indicated that with the passage of time a return of a public figure to private life was possible. *See also*, the concurring opinion of Justice Blackman, joined by Justice Marshall, 443 U.S. at 170, 99 S. Ct. at 2108. And *see* the Court of Appeals opinion in

(Cont'd)

Although this Court has indicated that the burden of proof is on the defendant to prove the public figure status of a defamation plaintiff, this Court has not settled this important issue. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352, 94 S. Ct. 2991, 3013, 41 L. Ed. 2d 789 (1974), where the plaintiff was found not to be a public figure, this Court pointed out that "respondent offered no proof" and that "absent clear evidence of general fame or notoriety" a person should not be deemed a general purpose public figure. Likewise, In *Hutchinson v. Proxmire,* 443 U.S. 111, 134-35, 99 S. Ct. 2615, 2688, 61 L. Ed. 2d 411 (1979), where it was held the plaintiff was not a public figure, this Court referred to the issue as a "defense," and pointed out that the evidence does not "demonstrate" that the plaintiff was a public figure. And, in *Wolston v. Reader's Digest Ass'n., Inc.*, 443 U.S. 151, 162-63, 99 S. Ct. 2101, 2701, 61 L. Ed. 2d 450 (1919), this Court, in holding the plaintiff not to be a public figure, stated:

> A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times.*

However, even in the face of the foregoing statements by this Court, prominent commentators have treated the burden of proof issue as an open one. Thus, in *Restatement, Torts* 2d §580A, comment *c,* at p. 211 (1977), it is stated:

> where the burden of proof lies . . . has not been settled.

(Cont'd)

the instant case (574 F.2d at 1087 n.10, App. at 27 n.10) where the Court notes "that theoretically the passage of time might permit a public figure to regain private status, but such was not the case here."

And in *Prosser & Keeton on Torts* 806 (1984) it is stated:

> probably the burden of proof will be on the defendant to show such facts as necessary to establish the favored category.

Of course, placing the burden on the defendant of proving the public figure status of the plaintiff would be consistent with the rule that the burden is on the defendant of proving "the presence of circumstances necessary for the existence of a privilege to publish the defamatory communication," *Restatement, Torts* 2d §613(2) (1917). And then the burden would fall on the plaintiff of proving abuse of the privilege, *i.e.*, actual malice.

B. This Court Has Not, But Should, Settle the Important Question of Whether a Libel Plaintiff's Status as a Public Figure Can Be Established by Mere Hearsay.

In the present case the crucial evidence relied upon by the Court of Appeals as establishing plaintiff-petitioner's status as a public figure consisted solely of hearsay[8] reports from news papers concerning "non-representational contacts" between petitioner and his clients. Thus, the Court of Appeals held:

> More important for the limited public figure determination are Marcone's non-representational contacts with the Pagans. As noted, Marcone *reportedly* met at the Pagans' headquarters with Frey, Heron and Mealy. In addition, *one newspaper article reported* that Marcone admitted to going on occasional weekend trips with motorcycle gang members.

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8. The trial judge recognized the newspaper articles as hearsay, but admitted them for the sole purpose of mitigating damages by showing petitioner's pre-publication reputation (N.T. 4.77: Charge of the Court 47).

* * *

> In this regard, Marcone's non-representational connections to the Castle and the Pagans are sufficient to tip the balance in the calculation.

(754 F.2d at 1086, App. at 25-26). (Emphasis added.)

This Court has never ruled on the question of whether the plaintiff's status as a public figure may be established by hearsay reports as in the present case. However, in the public figure cases decided by this Court the question has always appeared to be whether the plaintiff was actually a public figure rather than whether he or she was merely reputed to be a public figure. *See, e.g., Wolston v. Reader's Digest Ass'n, Inc.,* 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979); *Hutchinson v. Proxmire,* 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979); *Time, Inc. v. Firestone,* 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974). Moreover, requiring non-hearsay proof that the plaintiff was actually a public figure is consistent with this Court's analysis of the public figure defense as being based, not on the defendant's view of the plaintiff, but rather on the plaintiff's having voluntarily placed himself in a position where he is in the public eye. In *Gertz, supra,* 418 U.S. at 351, 94 S. Ct. at 3009, this Court defined the status of public figure as follows:

> For the most part those who attain this status *have assumed* roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures *have thrust themselves* to the forefront of particular public controversies in order to influence the

> resolution of the issues involved. In either event, *they invite attention and comment.* (Emphasis added.)

See also, to the same effect, *Hutchinson, supra,* 443 U.S. at 134, 99 S. Ct. at 2687-88. And *see Time, Inc. v. Firestone, supra,* 424 U.S. at 454-55, 96 S. Ct. at 965 where this Court, in finding the plaintiff not to be a public figure, held:

> Nor did respondent *freely choose* to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance '[r]esort to the judicial process . . . is no more *voluntary* in a realistic sense than that of the defendant called upon to defend his interests in court.' (Emphasis added).

C. This Court Has Not, But Should, Settle the Important Question of Whether There Is a Right to Jury Trial of Disputed Issues of Fact Related to Plaintiff's Status as a Public Figure.

In the present case the Court of Appeals made its own independent findings as to the facts, and then based on those findings determined that the petitioner was a limited purpose public figure. (957 F.2d at 1084-87, App. at 22-27). For example, newspaper articles on which the Court of Appeals relied stated that petitioner had meetings at the Castle. On the other hand, petitioner expressly denied having any connection with the Castle (N.T. 4.66). The Court of Appeals resolved this factual dispute by finding that petitioner had, in fact, met at the Castle (757 F.2d at 1086-87, App. at 25-27).

This Court has never ruled on the important question of whether there is a right to jury trial as to disputed subsidiary facts

on which the ultimate determination of the plaintiff's public figure status is based, even though the ultimate determination of the plaintiff's status may be for the Court. This question could arise in every defamation action where the status of the plaintiff is an issue.

On the closely related question of whether a libel plaintiff was a public official, this Court in *Rosenblatt v. Baer,* 383 U.S. 75, 88, 86 S. Ct. 669, 677, 15 L. Ed. 2d 597 (1966), stated:

> We remark only that, as is the case with questions of privilege generally it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'[15]

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15. 1 Harper & James, Torts §5.29 (1956); Prosser, Torts §110, p. 823 (3d ed. 1964); Restatement, Torts §619.

Each of the three authorities cited by this Court in *Rosenblatt* set forth the same division of function between judge and jury with regard to privilege, *i.e.,* whether a privileged occasion exists is determined by the court, but if the facts are in dispute, their determination is for the jury.

II.

THE COURT OF APPEALS HAS HELD PLAINTIFF-PETITIONER TO BE A LIMITED PURPOSE PUBLIC FIGURE BASED ON AN ANALYSIS WHICH IS INCONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Court of Appeals, Inconsistent with Applicable Decisions of this Court, Held that the Indictment of the Plaintiff-Petitioner for a Crime of Which He Was Never Convicted Amounted to an Involvement in a Public Controversy Militating in Favor of His Being Held to be a Limited Purpose Public Figure.

The Court of Appeals, consistent with this Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352, 94 S. Ct. 2997, 3013, 41 L.Ed.2d 789 (1974), correctly started its analysis of the question of whether plaintiff-petitioner was a limited purpose public figure by holding:

> To determine whether Marcone was a limited purpose public figure with regard to his alleged involvement in the purchase and sale of illicit drugs, we must consider (1) whether drug trafficking is a 'public controversy' and (2) the 'nature and extent' of Marcone's participation in this controversy.

754 F.2d at 1082, App. at 18. However, the Court of Appeals then departs drastically from the applicable decisions of this Court.

(1) The Court of Appeals Erroneously Defined Public Controversy Inconsistently With the Applicable Decisions of this Court.

The Court of Appeals held that —

> Drug trafficking of such mammoth proportions, which is one of the most troubling issues of our time, surely falls within the ambit of public controversy.

754 F.2d at 1083, App. at 19. This analysis of what constitutes a public controversy is in direct conflict with this Court's decision in *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 166 n.8, 99 S. Ct. 2701, 2701 n.8, 61 L.Ed.2d 450 (1979), where the Court concluded that the plaintiff, who had been listed by the defendant as a Soviet spy, was not a public figure, holding:

> Certainly, there was no public controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States; all responsible United States citizens understandably were and are opposed to it.

See also, to the same effect *Hutchinson v. Proxmire,* 443 U.S. 111, 135, 99 S. Ct. 2675, 2688, 61 L. Ed. 2d 411 (1979).

The Court of Appeals, however, flouted the authority of this Court by intentionally deciding the point in direct conflict with this Court's decision in *Wolston.* This is demonstrated by footnote 8 of the Court of Appeals opinion in which the Court states:

> We reject the notion that merely because most people would agree that drug trafficking is undesirable, there is no 'controversy' regarding the matter.

754 F.2d at 1083 n.8, App. 19 n.8. This statement is then followed by the citation of *Wolston* with the signal "*see*" and the citation of a law review article[9] in which the author, on the pages cited

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9. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel,* 132 U. of Pa. L. Rev. 1, 56-57 (1983).

by the Court of Appeals, characterizes this Court's analysis in *Wolston* as "myopic," "facially spurious," "ludicrous," "hypertechnical" and "flawed."

(2) The Court of Appeals, Inconsistent with the Applicable Decisions of this Court, Equated Plaintiff-Petitioner's Indictment on Drug Charges with Voluntary Participation by Him in Drug Trafficking.

After discussing plaintiff-petitioner's indictment on drug charges, the Court of Appeals equated petitioner's indictment with actual voluntary participation in criminal activity, holding:

> Although the criminal activity, by itself, may not create public figure status, such activity may, nevertheless, be one element in a mix of factors leading to that classification. Moreover, the crime involved in *Wolston* was particularly passive — a contempt citation for failure to appear at a grand jury hearing because of ill health. In the present case, however, Marcone was indicted for participating, not in a passive manner, in a drug conspiracy. This factor may be considered in our analysis of Marcone's status.

754 F.2d at 1085, App. at 24. This use by the Court of Appeals of plaintiff-petitioner's indictment on drug charges as evidence that he, in fact, was involved in drug trafficking and had, thus, thrust himself into a public controversy is inconsistent with applicable decisions of this Court. In *Time, Inc. v. Firestone,* 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976), this Court held:

> '[r]esort to the judicial process . . . is no more voluntary in a realistic sense than that of the

> defendant called upon to defend his interest in court.'

424 U.S. at 454, 96 S. Ct. at 965.

> And while participants in some litigation may be legitimate 'public figures,' either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others.

424 U.S. at 457, 96 S. Ct. at 966-67. And in *Wolston v. Reader's Digest, Ass'n., Inc.*, 443 U.S. 157, 167, 99 S. Ct. 2701, 2707, 61 L. Ed. 2d 450 (1979), this Court held:

> A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.

B. The Court of Appeals, Inconsistent with Applicable Decisions of this Court, Held that the Conduct of the Plaintiff-Petitioner as an Attorney in Connection with His Clients Rendered Him a Limited Purpose Public Figure

After stating that "[n]othing in the record of the present case indicates that Marcone was engaged in bringing attention to his clients or himself in regard to their legal relationship," the Court of Appeals holds that it "may give only limited significance to Marcone's representational activities in the public figure analysis." 754 F.2d at 1086, App. at 25. In attributing any significance whatsoever to the petitioner's representation of his clients, no

matter how notorious or controversial the clients, the Court of Appeals' decision conflicts with this Court's holding in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), that an attorney's representation of a client does not make the attorney a public figure. *See also, Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167, 99 S. Ct. 2701, 2707, 61 L. Ed. 2d 450 (1979), where this Court described *Gertz* as holding —

> that an attorney was not a public figure even though he associated himself with a case that was certain to receive extensive media coverage.

And as is pointed out by Mr. Justice Blackmun in his concurring opinion in *Gertz*, "the advocate is not to be invidiously identified with his client" since to do so would "gravely jeopardize" the right to counsel. *Gertz, supra*, 418 U.S. at 355, 94 S. Ct. at 3014.

III.

THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS IN OTHER CIRCUITS AS TO THE METHOD OF RESOLVING CONFLICTING INFERENCES FROM THE EVIDENCE ON THE ISSUE OF ACTUAL MALICE.

The Penthouse article involved in the present case was written by Edward Rasen, a free-lance writer. The only existing drafts of the article state:

> Frank Marcone, an attorney from the Philadelphia area, contributed down payments of up to $25,000 towards shipments. Charges were dismissed in favor of another indictment.

However, the article as published by Penthouse stated:

> Frank Marcone, an attorney from the Philadelphia area, contributed down payments of up to $25,000 on grass transactions. Charges against him were dismissed because he cooperated with further investigations.[10]

There was no evidence as to why the article as published contained the statement that charges against Marcone were dismissed because he cooperated with further investigations. Indeed, before the article had been published, Penthouse had in its possession a Senate Subcommittee report indicating that an

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10. In addition to indicating petitioner's guilt of the crime, this statement could also be found to be defamatory on the ground that it could be interpreted as meaning that Marcone had cooperated by disclosing privileged information he received from clients.

indictment was dismissed against Marcone and that he was to be reindicted in Philadelphia.[11] This report stated in a footnote that the sentence of certain persons other than Marcone had been reduced because of their cooperation with the authorities. The other two sources upon which Penthouse had to rely in publishing the defamatory statements about Marcone were the author's notes and an article in *The Philadelphia Inquirer*. The author's notes were not produced by respondent at trial, and the editor of the article had no recollection as to what the notes contained concerning Marcone. The *Inquirer* article referred to the indictment against Marcone, but did not state that Marcone had actually committed the crime and did not say that he had cooperated with further investigations.

At trial, Penthouse argued that the footnote in the Senate Subcommittee report could have been misinterpreted by someone at Penthouse to mean that Marcone cooperated with the government. In answer to special interrogatories, however, the jury expressly found that Penthouse published false and defamatory statements about Marcone either with knowledge of their falsity or with reckless disregard as to whether they were true or false. Thus, the jury rejected Penthouse's argument. Nevertheless, the Court of Appeals overturned the jury's finding, and adopted respondent's argument, holding that "the source of the mistaken alteration is clear. * * * Someone at the magazine apparently misread the footnote as also referring to . . . Marcone." 754 F.2d at 1090, App. at 35-36.

By accepting Penthouse's argument, which had been rejected by the jury, and on that basis entering judgment notwithstanding the verdict, the Court of Appeals, in effect, viewed the evidence

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11. Petitioner was, in fact, never reindicted and no further criminal proceedings were brought against him because of a lack of evidence. (577 F. Supp. at 329, App. at 106-7).

in the light most favorable to the respondent.[12] In this regard the Court of Appeals' decision is in direct conflict with the decisions of the Courts of Appeals of other Circuits on the same issue.

The Court of Appeals for the District of Columbia Circuit in *Tavoulareas v. The Washington Post Company,* 83-1605 (U.S. Court of Appeals, D.C. Cir. April 9, 1985) (Pet. for Reh. pending), reversed the District Court's Order entering judgment for the defendant notwithstanding the verdict, and in so doing held:

> Our review commands only that we evaluate the inferences most favorable to the plaintiff, examine them for their reasonableness, and determine whether they support a finding that the plaintiffs have clearly and convincingly demonstrated actual malice.

Slip opinion at 79.

The Court of Appeals for the Ninth Circuit in *Alioto v. Cowles Communications, Inc.,* 519 F.2d 777, 780 (9th Cir.), *cert. denied,* 423 U.S. 930, 96 S. Ct. 280, 46 L. Ed. 2d 259 (1975), likewise, held that an appellate review to determine the adequacy of the evidence of actual malice in a public official libel case must draw all permissible inferences in the plaintiff's favor and resolve all questions of credibility in his behalf. *See also,* to the same effect, *Guam Federation of Teachers, Local 1581 v. Ysrael,* 492 F.2d 438 (9th Cir.), *cert. denied,* 419 U.S. 872, 95 S. Ct. 132, 42 L. Ed. 2d 111 (1974).

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12. Petitioner, by no means, concedes that it is a fair inference from the record that the foonote in the Senate report was, in fact, misread as argued by Penthouse. But for present purposes, it is sufficient to accept the proposition that it is reasonable to view the report either way.

This Court should, therefore, grant certiorari to resolve this conflict among the Circuits as to the method of resolving conflicting inferences during an appellate review of the record to determine the adequacy of the evidence of actual malice in a public official or public figure libel case.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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